Date: **September 19, 2011**

To: **Beth Lenstra**

Subject: **Excerpt of Infirm/Medical Parole Eligibility Memo Prepared for Louisiana Sentencing Commission (Spring 2011)**

Overview

Infirm prisoners present a unique challenge to policymakers trying to balance increasing prison costs with declining budget revenues. Often, as inmates serving longer sentences experience declining health, the cost of their medical care grows to nearly three times the cost of care for an average prisoner. Because the release of infirm prisoners presents a low-risk in terms of public safety, states seeking to focus their limited resources on dangerous, high-risk prisoners have begun to explore ways to expand medical parole eligibility.[1]

The following is a survey of some of the methods employed by states around the country, with jurisdiction-specific examples and statutory language. This memorandum is intended to provide a general overview of medical parole legislation for the Louisiana Sentencing Commission. It is not a comprehensive legislative scan. Next steps may include deciding which of these legislative options, if any, could work in Louisiana and whether to explore these or others in greater detail.

Expanding Medical Parole Eligibility

1. Broaden the Definition for Qualifying Medical Conditions

One of the main components of a medical parole release statute is the definition of what constitutes a qualifying medical condition. Definitions vary widely among states, usually by degrees of physical or mental incapacitation, terminal illness, or inability to care for oneself. [2] Strict definitions limit the number of people that are eligible. Broad definitions open eligibility to more prisoners, often those with more serious crimes and longer sentences. Seeking balance, states have begun to broaden definitions of qualifying conditions to allow more releases, but without jeopardizing public safety or undermining the credibility of the criminal justice system:

- ***Texas.*** Texas, through its Medically Recommended Intensive Supervision (MRIS) policy, has one of the broadest definitions of which conditions qualify for medical release. Under Texas law, inmates who are identified "as being elderly, physically disabled, mentally ill, terminally ill, or mentally retarded or having a condition requiring long-term

[1] The National Conference of State Legislatures cites research in its *Issues and Research*, Vol. 29, Issue 522, showing that "prisoners over 55 have recidivism rates of 2 percent to 8 percent, compared to 70 percent for the general population."

[2] Under Louisiana Revised Statute 15:574.20(2)(B)(1) and (2), only inmates that are "permanently incapacitated" and/or "terminally ill" are eligible for medical parole. DPS&C Regulation HC-06 authorizes compassionate release for inmates that have a terminal illness and life expectancy less than 60 days, and for inmates that are permanently incapacitated and going to a medical facility.

care" can be considered for release.[3] This allows Texas to release a considerable number of prisoners. In the 2008 fiscal year, 103 prisoners were approved for MRIS.[4]

- ***Washington.*** The state of Washington recently amended its early release statute to focus on cost savings to the state. The new law, adopted in 2009, describes the qualifying medical condition as one "that is serious and is expected to require costly care or treatment." Additionally, the law requires that "granting [release] will result in a cost savings to the state."[5] By changing the statute this way, policy makers have codified the release of low-risk individuals who represent the highest cost to the state. Despite this new law, there have only been nine medical paroles in 2010, up from two in 2008 and seven in 2009.[6]

- ***Wisconsin.*** In 2008, Wisconsin expanded its medical release statute to no longer require an inmate to be terminally ill; instead, if a prisoner has an "extraordinary health condition" he or she can qualify for release.[7] This requires that the prisoner have "a condition afflicting a person, such as advanced age, infirmity, or disability of the person or a need for medical treatment or services not available within a correctional institution."

2. Broaden which Crimes Qualify for Medical Parole

Many states automatically disqualify individuals who were convicted of certain serious crimes, often violent crimes and sex offenses, from infirm or elderly release. However, because offenders convicted of these serious crimes receive long prison terms and are more likely to become elderly and develop critical medical conditions in prison, some states are expanding parole eligibility to include them.

- ***New York.*** In 2009, New York State amended its medical parole statute to allow chronically and terminally ill prisoners convicted of certain violent and sexual crimes to become parole eligible if they have served at least half of their sentence. Specifically, now eligible are prisoners convicted of "murder in the second degree, manslaughter in the first degree, any [sex offense] or an attempt to commit any of these offenses," provided "he or she has served at least one-half of the minimum period of the sentence."[8] Although the number of medical parole applications has tripled as a result of this amendment, there has been no corresponding increase in the number of people granted medical parole.[9]

Modifying Medical Parole Granting Authority

[3] Tex. Gov't Code Ann. § 508.146.
[4] Texas Correctional Office on Offenders with Medical and Mental Impairments (TCOOMMI), *The Biennial Report of the Texas Correctional Office on Offenders with Medical and Mental Impairments* (2009).
[5] Wash. Rev. Code § 9.94A.728.
[6] This may be partly due to recent medical parole release staff cuts.
[7] Wis. Stat. § 302.1135.
[8] N.Y. Law § 259-r.
[9] "Law Has Little Effect on Early Release for Inmates," *New York Times*, January 29, 2010.

In many states the authority to grant early medical release lies with the parole board. In these states, medical parole is often treated as another form of parole. However, some states have given the discretion to grant medical parole to the courts or to the department of corrections. This could be because department of corrections personnel are in a better position to assess the medical condition of infirm inmates, or because traditional parole boards have been reluctant to grant medical parole.

- ***Alabama.*** In 2008, Alabama enacted legislation that granted medical parole discretion to the Department of Corrections. This authority includes not only making the decision about whether an inmate is granted medical parole, but also "the conditions of release of any inmate [released on medical furlough], including the appropriate level of supervision of the inmate" and "develop[ing] a discharge plan for each inmate released." Prior to making this decision, the commissioner must notify the prosecuting attorney's office and the victim(s) of the crime in writing, first giving them an opportunity to object.[10]

- ***Pennsylvania***. In 2008, Pennsylvania adopted comprehensive prison reform legislation that included a reform of its medical release policy.[11] In the new policy, the authority to release an individual to a hospital or nursing care facility lies with the courts. Either the Department of Corrections or the prisoner or her/his proxy can petition the court to defer the sentence and have the prisoner placed in a medical facility. The judge who sentenced the prisoner, or the presiding judge in the county where the prisoner was sentenced, has the sole authority to grant the prisoner's petition for medical release. However, if the prisoner is approved for medical release, the Department of Corrections or the prosecuting attorney can petition to have the individual recommitted if circumstances such as the prisoner's health change.

Establishing Policies Regarding Payment for Medical Costs

When a prisoner is released on medical furlough, the state may still be faced with paying for the required medical care. Because many prisoners on medical release cannot afford to pay the high costs for medical care, many are paroled to state or private nursing facilities where federal Medicaid or Medicare benefits will cover these costs. To expedite this process and remove the burden from the state as quickly as possible, some states require that the Department of Corrections work with other agencies or help prisoners access federal benefits.

- ***California.*** In 2010, California passed a comprehensive bill allowing medical parole for medically incapacitated prisoners.[12] A large portion of this bill focuses on how the state will address the issue of paying for the costs of medical care once prisoners are paroled. Specifically, it requires the Department of Corrections and Rehabilitation to enter memoranda of understanding with state agencies to "facilitate the pre-release agreements to help [the] inmate initiate benefits claims." The department is to ensure that every person released on medical parole has applied for any benefits for which he or she qualifies. It also requires that the department reimburse the state hospital or

[10] Ala. Code § 14-14 (1-7).
[11] Pennsylvania HB 7 (2007).
[12] California SB 1399 (2010).

facility for any costs that are not covered under federal benefits. If an individual released on medical parole does not qualify for federal benefits and is unable to individually pay the costs of care, the bill requires the department to enter into contracts with agencies that can provide care and pay costs for that care.

- ***Texas.*** The MRIS process in Texas establishes a way for the department of corrections to proactively enter agreements with medical providers in the community. The Texas statute requires that the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI) and the Department of Health Services "request proposals from public or private vendors to provide under contract services for inmates released on [MRIS]."[13] This allows the department to have some way of guaranteeing that the medical parolee has his or her needs met. They can also make specific requests in the proposal, such as requiring that the medical care facility be located in a particular geographic area.

[13] Tex. Gov't Code Ann. § 508.146.